

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Therm-X Chemical and Oil Corp. : AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Corporation :  
Franchise Tax under Article 9A of the Tax Law for :  
the F/Y/E 2/28/79. :

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State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 2nd day of May, 1984, he served the within notice of Decision by certified mail upon Therm-X Chemical and Oil Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Therm-X Chemical and Oil Corp.  
P.O. Box 395  
74 Mall Drive  
Commack, NY 11725

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
2nd day of May, 1984.

David Parchuck

Annex Attachment  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE TAX COMMISSION

# AFFIDAVIT OF MAILING

State of New York }  
County of Albany } ss.:

Milton Siegal  
9 Juneay Blvd.  
Woodbury, NY 11797

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

David Paruch

*James A. Kuykendall*  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

May 2, 1984

Therm-X Chemical and Oil Corp.  
P.O. Box 395  
74 Mall Drive  
Commack, NY 11725

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Law Bureau - Litigation Unit  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Milton Siegal  
9 Juneay Blvd.  
Woodbury, NY 11797  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
THERM-X CHEMICAL AND OIL CORP.	:	DECISION
	:	
for Redetermination of a Deficiency or for Refund	:	
of Franchise Tax on Business Corporations under	:	
Article 27 of the Tax Law for the Fiscal Year	:	
Ended February 28, 1979.	:	

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Petitioner, Therm-X Chemical and Oil Corp., 74 Mall Drive, Commack, New York 11725, filed a petition for redetermination of a deficiency or for refund of franchise tax on business corporations under Article 27 of the Tax Law for the fiscal year ended February 28, 1979 (File No. 35618).

A formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 5, 1983 at 1:15 P.M. Petitioner appeared by Milton Siegal, CPA. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether petitioner's failure to timely pay the full amount of franchise tax due for the fiscal year at issue was attributable to reasonable cause, so as to warrant cancellation of the penalty imposed under Tax Law section 1085(a)(2).

FINDINGS OF FACT

1.(a) On or about May 16, 1979, petitioner, Therm-X Chemical and Oil Corp. ("Therm-X"), submitted to the Audit Division an Application for 3-Month Extension for Filing Tax Report (Form CT-5) for the fiscal year ended February 28, 1979. Petitioner enclosed no remittance therewith, inasmuch as its prepayments of tax

for such fiscal year (\$3,500.00) exceeded its tax liability for the previous fiscal year (\$2,482.35).

(b) The Audit Division subsequently granted petitioner an additional extension for filing its fiscal year 1979 report to November 15, 1979.

(c) On November 15, 1979, Therm-X filed its franchise tax report for the fiscal year ended February 28, 1979, computing a balance due with the report of \$107,866.58 (tax liability of \$110,666.58, plus the first installment for the period following that covered by the report of \$700.00, less prepayments of \$3,500.00), and remitted \$30,000.00.

2. On December 19, 1979, the Audit Division issued to Therm-X a Notice and Demand for Payment of Corporation Tax Due, assessing the balance of franchise tax computed but unpaid by petitioner for fiscal year 1979, plus interest, and penalties for late filing and late payment pursuant to Tax Law section 1085, subsection (a), paragraphs (1) and (2).

3. By letter dated August 30, 1983, the Audit Division advised petitioner's then representative that the penalty under section 1085(a)(1) for late filing had been erroneously imposed and was accordingly cancelled. The Audit Division found no basis, however, for waiver or cancellation of the penalty for late payment; the letter stated, in pertinent part, "The Tax Law and Regulations do not support waiver of a late payment penalty because the taxpayer lacked sufficient funds to timely pay the taxes due." At the formal hearing, the parties agreed that the amount of penalty remaining at issue, under section 1085(a)(2), is \$8,584.99.<sup>1</sup>

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<sup>1</sup> After the crediting of payments made by petitioner and the deduction of a net operating loss comprised of carrybacks from fiscal years 1980, 1981 and 1982, the amount of penalty outstanding is \$1,054.38. Petitioner will thus owe such sum if the penalty is sustained. In the event the penalty is cancelled, petitioner will be entitled to a refund of \$7,530.61.

Enclosed with the letter was a recomputation of the penalty which reflected, among other things, the satisfaction of petitioner's tax liability by net operating loss carrybacks and by payments of \$5,000.00 and \$51,639.48 made on October 9, 1980 and March 25, 1983, respectively.

4. Petitioner's position is that a series of events, commencing in 1978 with the conviction of its chief bookkeeper, justified and constituted reasonable cause for its late payment of franchise tax for fiscal year 1979.

In November, 1978, Mrs. Stephanie Zappacosta, Therm-X's chief bookkeeper, was arrested and charged with the theft from Therm-X of \$600,000.00, by forging company checks over a five-year period. The following month, she pleaded guilty to forgery in the second degree and grand larceny in the second degree.

Petitioner's independent accountant, an elderly man who, due to these stressful events, became incapable of continuing his duties, was relieved of his position. Therm-X retained a new accounting firm, Daniel Rynkar & Co. The firm discovered fraudulent entries made by Mrs. Zappacosta and was thus compelled to reconstruct Therm-X's books and records.

Finally, Allen Roth, president of Therm-X, died suddenly of a heart attack.

As Mr. Siegal (petitioner's representative in this proceeding) stated in a letter to Therm-X's counsel dated May 18, 1983, "The corporation was hit hard by many tragic blows... Therm-X made every effort to comply with all its tax responsibilities."

5. On August 24, 1983, Therm-X submitted to the Internal Revenue Service a claim (federal Form 843) for refund of \$28,358.84, the amount of penalty imposed for failure to timely pay federal corporation income tax for the fiscal year ended February 28, 1979. By letter dated September 13, 1983, the Service

informed Therm-X that \$25,514.10 of its claim was allowed, the remainder of the penalty (\$2,844.74) having been previously abated.

CONCLUSIONS OF LAW

A. That Tax Law section 1085, subsection (a), paragraph (2) imposes an addition to tax for failure to pay the amount shown as tax on a return, at the rate of one-half of one percent of the amount of such tax per month or fraction thereof, but not exceeding 25 percent in the aggregate. The penalty is not imposed, however, if it is shown that the failure was due to reasonable cause and not due to willful neglect.

B. That in view of the events set forth in Finding of Fact "4", and petitioner's good faith efforts to fulfill its tax responsibilities in spite of the inevitable disruption to its finances which these events engendered, reasonable cause existed for petitioner's failure to timely pay the full amount of tax due. See 20 NYCRR 9-1.5(a)(1) and (2), as in force for the period at issue.

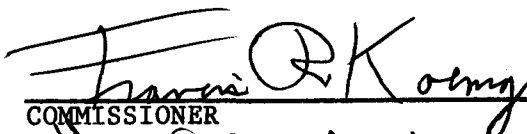
C. That the petition of Therm-X Chemical and Oil Corp. is granted, and a refund based on the cancellation of penalty imposed under section 1085(a)(2) of the Tax Law is granted.

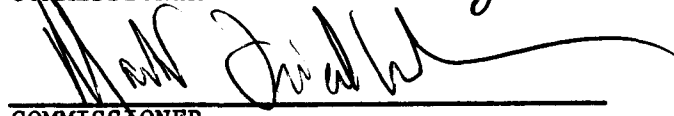
DATED: Albany, New York

STATE TAX COMMISSION

MAY 02 1984

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER